Supreme Court, U. S.
FILED
JUL 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October, 1978

NO. 78-130

RE: APPEAL FROM ADMINISTRATIVE

DECISION OF THE FIRE

ADMINISTRATOR

APPELLANTS:

Donald Cole
George Dickey, Jr.
Milton Hoyle
David James

PETITION FOR A WRIT OF CERTIORARI
TO THE JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY, MARYLAND

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OPINIONS BELOW

The opinion and order of the Circuit Court for Anne Arundel County is unreported. A copy of this opinion is included in the appendix.

JURISDICTIONAL STATEMENT

Judgment in this case was rendered on April 26, 1978 and became final on April 29, 1978. This court has jurisdiction over this matter under 28 U.S.C. Sec. 1257.

QUESTION PRESENTED

1. Whether a de novo hearing of an administrative appeal by an independent administrative board, without statutory authority, following a required full hearing by the lower administrative agency is a denial of due process of law?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, REGULATIONS

United States Constitution, Amendment 14, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ANNE ARUNDEL COUNTY CODE, APPENDIX A,Sec.521

The Personnel Board shall have the power and shall be required:

(a) To adopt rules and regulations which shall have the force of law to the extent consistent with the terms of this

Charter. Among other things, the rules and regulations shall provide for a method of holding competitive examinations, the general character of examinations for original appointment and promotion, transfers of employees within the classified service, and the procedures for determining the eligibility of applicants to participate in examinations.

(c) To hear and to decide finally for the County in open meeting appeals from and actions pertaining to the allocation or re-allocation of positions and from any disciplinary action suspending for more than sixty days, reducing the rank or pay or removing any officer or employee in the classified service.

STATEMENT OF THE CASE

On April 26, 1978 the Circuit Court for Anne Arundel County (hereinafter referred to as the state court) rejected petitioners claim that the Personnel Board for Anne Arundel County (hereinafter referred to as the Personnel Board, or the Board) denied them due process by hearing their administrative appeal de novo without statutory authority. Petitioners had sought review of the Board from a decision of the Anne Arundel County Fire Administrator dismissing them as tenured county firefighters. Petitioners claimed the Fire Administrator's decision was both arbitrary and illegal. Over petitioners objection (a matter stipulated by counsel before the state court due to the loss of several pages of transcript in which the actual objection before the Board appeared) the Board heard the appeal de novo.

Petitioners submitted an order for appeal. Subsequently, they submitted several petitions for appeal. A Petition for Appeal, an Amended Petitioner for Appeal, and a Second

Amended Petition for Appeal. In each they raised the objection that the Board had heard the appeal de novo. Moreover, petitioners submitted the question of whether this act was a denial of due process in written memorandum to the state court, and in oral arguments to the court.

At the core of this matter is the action taken against petitioners by the Fire Administrator. Charges were brought against petitioners claiming they were guilty of conduct unbecoming their rank, and disgraceful conduct threatening order, safety, health or public respect for the County service. Petitioners were charged with having sexual involvement with a fourteen year old female while on county property, during work hours.

Petitioners were never found guilty of any criminal conduct in this matter. Although charges were brought, the court placed petitioners on probation before verdict following their statement that they wished to plead nolo contendere because they believed that the state could prove its case. The court stated it found no criminal intent in this case.

A mandatory disciplinary hearing was held before the Fire Administrator at that hearing. The petitioners also said they believed the state could prove its case. However, they requested that the Administrator consider other circumstances in reaching his decision. The Administrator ordered petitioners dismissed.

Under Anne Arundel County Charter, personnel decisions of the Fire Administrator are appealable to the Personnel Board. The Board has the power to hear and decide appeals finally for the County. The County claimed that the word *finally* implied the right to hear the appeal de novo. Therefore, Petitioners objection to a de novo hearing was overruled.

The Personnel Board after a de novo hearing sustained the Fire Administrators Order. Thereupon, petitioners appealed to the state court.

Although the County claimed that the Board had the power to finally decide Constitutional Questions, the state court ruled it had jurisdiction to hear the due process arguments raised by petitioners. Following an extended appellate review by the state court, all of petitioners claims were denied. In particular, in dealing with the de novo question the state court said in its opinion and order, "The court finds no violation of due process in the matter in which the Personnel Board conducted the proceedings."

As the decision of the state court is not reviewable by appeal or certiorari in Maryland petitioners have sought certiorari from this court on the de novo hearing question.

ARGUMENT

Adenovo hearing of an administrative appeal by an independent administrative board, without statutory authority, following a required full hearing by a lower administrative agency is a denial of due process of law.

Petitioners were denied due process of law by the state court. The court upheld the Personnel Board's affirmance of an order by the Fire Administrator following a required disciplinary hearing dismissing petitioners as tenured county firefighters. The Board conducted a de novo hearing of petitioners appeal despite its authorization merely to hear and decide finally for the county, appeals from county agency personnel action. Anne Arundel County Code, Appendix A, Sec. 521 (c). Petitioners objected to the de novo hearing as beyond the Board's jurisdiction and therefore a denial of due process.

This court has not previously determined whether a de novo administrative appeal without statutory authorization is a denial of due process. The question is important for two reasons. First, this court has ruled that administrative boards have only such powers as are granted by statute. *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Comm.*, 291 U.S. 587 (1933). While a de novo hearing may be required where initial administrative decisions are made without a hearing required by due process, *see Dargel v. Barr*, 204 F.2d 697 (1953), this is not so after a required hearing *c.f. Newport News Shipbuilding & Dry Dock Co. v. U.S.*, 374 F.2d 516 (1967). Thus, an administrative appellate de novo hearing from an order arrived at after a required hearing must be specifically authorized.

Second, a de novo hearing under these circumstances is more than a procedural defect which subsequently can be remedied. The de novo hearing requires the administrative board to hear potentially inflamatory evidence which could both misdirect the appellate tribunals attention away from the points raised on appeal and prejudice the Board's deliberation.

Petitioners case aptly demonstrates the prejudicial effect a de novo hearing may have on an administrative appellate tribunal. In support of the de novo hearing the county argued that if petitioners couldn't be fired after what they had done, the county couldn't fire anyone. Thus, the county contended it had the right to present evidence of the petitioners sexual involvement with a fourteen year old female child at a hearing where petitioners were simply challenging whether the Fire Administrator had afforded them due process of law. The effect of the evidentiary presentation was prejudicial and a denial of due process.

Beyond petitioners case, however, the general public has the right to be protected from oppressive administrative procedures. Administrative boards should not be left free to adopt procedures which enable them to reach results they desire. Nor, should administrative boards be free to smother the public in legal procedures, the effect of which is to downplay the rights of administrative appellants because their actions are unpopular or even scandalous.

Moreover, the state court decided this issue in a way probably contrary to the decisions of this court. The state court relied on the facts that the Personnel Board Hearing Rules of Procedures, adotped under Anne ARundel County Code, Appendix A, sec. 521(1), contemplated a de novo procedure and that the Board has traditionally held de novo appellate hearings. However, this court has held that administrative boards cannot merely assume official powers. *Federal Trade Comm'n. v. Raladam Co.*, 283 U.S. 643 (1930). As the power to hear and decide appeals does not require the Personnel Board to conduct de novo hearings for factual determinations, the power exercised by the Board has merely been assumed without statutory authority. The rules cannot permit what the statutory grant does not authorize. Therefore, the state court decision is contrary to the rulings of this court.

Thus, this court should grant certiorari to review the judgment of the state court.

APPENDIX

ANNE ARUNDEL COUNTY v. COLE

(A copy of this decision was sent to each of the petitioners hearing the individual petitioners name.)

July 16, 1975

TO: Fire Fighters III Donald Cole
FROM: Chief Harry W. Klasmeier - Fire Administrator
SUBJECT: Departmental Charges

MESSAGE:

On Monday, June 30, 1975 a hearing was conducted at Fire Department Headquarters regarding charges brought against you by Lieutenant Jack H. Morgan.

As required by Section §§: 3.5 of the Rules and Regulations of the Fire Department you were informed of the charges and were requested to appear at a hearing at Fire Department Headquarters.

A hearing was conducted by this office on the date indicated.

As a result of the hearing conducted on Monday, June 30, 1975 it is the decision of this office that you were in violation of Section §§: 9.4.1.2 and §§: 9.5.4 of the Employee Relation Manual.

Section PR: 9.4.1.2 - That the employee has committed an act on or off duty which amounts to conduct unbecoming to his rank or position.

Section PR: 9.5.4 - ("Intoxication or disgraceful conduct. Intoxication or disorderly conduct while on duty;) *disgraceful conduct while on or off duty when such behavior threatens order, safety, health or public respect for the County Service."*

Under the provisions of Section §§. 3.7 of the Rules and Regulations of the Fire Department.

§§; *3.7*

The Fire Administrator shall judge the Charges and render a decision in writing to all parties. Punishment may be in the form of a reprimand, suspension without pay, or dismissal.

Your employment with Anne Arundel County Fire Department is hereby terminated effective July 16, 1975.

You will be compensated through July 16, 1975.

By authority,

/s/Harry W. Klasmeier
Fire Administrator

HWK/slc

cc to: Mr. Don Pennington - Personnel Officer
Deputy Chief Haigley
Division Chief Alvin W. Lenz
Lieutenant Jack H. Morgan

Received Date 7-16-75

/s/Donald Cole
Fire Fighter III Donald Cole

/s/Lawrence A. Gadiner
Witness:

RE: Appeal from an Administrative Decision of the of the Fire Administrator Appellant: Donald R. Cole	* * * * * * * * * *	Before Personnel Board of Anne Arundel County Case No.: PB1-75 Hearing: Sept. 8, Sept. 30, 1975

OPINION

This case is an appeal from the decision of the Fire Administrator, Harry W. Klasmeier, in the matter of the termination of Donald R. Cole.

The appellant was represented by Lloyd Clinton, Attorney, and his case was presented through the introduction of various documents and direct testimony by his attorney, and by Mr. Vincent Pleyo, Mr. Milton Hoyle, Mr. Charles Bohn, Mr. Bayner, Mr. Halfield, Mr. Kalb, Mr. Ward, Mr. Connell, Mr. Peters, Mr. Glaubitz, President of the Prince George's County Firefighters Union, and Capt. Burton Phelps, president of the Anne Arundel County Firefighters Union, Local 1563.

Mr. Carl Tenner, Assistant County Solicitor, presented the County's position through the introduction of various exhibits and documents and through direct testimony of Chief Harry Klasmeier, Detective Wayne Marshall, Anne Arundel County Police Department, and Lt. Jack Morgan, Anne Arundel County Fire Department.

In closed session, the Personnel Board reviewed and weighed the evidence presented during the hearing, all of which was recorded verbatim and so will not be re-iterated herein.

In reviewing the evidence the Board was of the opinion that there are a number of questions which were raised and should be considered. In reviewing the evidence it was a unanimous opinion of the Board that under the procedures set forth there is no requirement that a grievance filed by the Fire Department.

As to the second important issue, the Board finds that each man was properly notified of the charges and was given an opportunity to be represented by counsel and to speak in his own behalf and was properly notified of the Fire Administrator's decision following the departmental hearing.

Having satisfactorily answered these questions, the Board then addressed themselves to the facts presented to determine if, in effect, the employee violated Section 9.4.1.2, "That the employee has committed an act on or off duty which amounts to conduct unbecoming to his rank or position" and Section 9.5.4 "Intoxication or disgraceful conduct. Intoxication or disorderly conduct while on duty; disgraceful conduct while on or off duty when such behavior threatens order, safety, health or public respect for the County service" of the Personnel Regulations.

The Board could find no evidence presented by the appellant to refute the charges made nor did he deny that he did engage in sexual relations with a 14 year old girl while on duty and on County property.

After carefully reviewing the factual evidence as well as the circumstances involved the Board concluded that Mr. Cole did violate the Personnel Rules cited. In considering the severity of the disciplinary action as it relates to the offense it is the Board's opinion that the action taken by the Fire Administrator was proper.

ORDER

It is therefore, this 23rd day of October 1975, ORDERED that the appeal on behalf of Donald R. Cole be denied, and the Personnel Board sustains the action taken by the Fire Administrator.

Personnel Board of Anne
Arundel County

/s/Leonard Finley, Chairman
Thomas Hunt, Member
Charlotte O'Leary, Member
Charles Sturm, Member
James Hutson, Member

RE: APPEAL FROM ADMINISTRATIVE DECISION OF THE FIRE ADMINISTRATOR
APPELLANTS:
DONALD COLE, et al.

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY,
LAW NO. C-10.044

MEMORANDUM OPINION AND ORDER

Appellants, feeling aggrieved at their dismissal from employment, now seek review of the action taken against them by their employer, Anne Arundel County. This Court earlier held that *Section 5.2.1(e)* of the Charter of Anne Arundel County limiting Court review of action taken by the County Personnel Board to a determination of whether or not the Personnel Board had jurisdiction to hear the matter, was an impermissible restraint on the Court's inherent power to review actions of Administrative Agencies or Boards. *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486.

Appellants here were dismissed from their positions as firemen as a result of their activities involving sexual relations with a 14 year old girl while on duty and on County property. The Personnel Board upheld their dismissal by the Fire Department Administrator.

First, Appellants contend that the Personnel Board acted illegally in conducting a de novo hearing. Appellants' authority, *2 M.L.E., Section 373 (Appeals)* is misplaced, since it applies to appeals from a lower Court and not to appeals from administrative action. There appears no provision in the County Charter or Code prohibiting the Personnel Board from hearing the matter de novo. Further, Affidavits from the various members of the Personnel Board state that appeals to the Board have traditionally been on a de novo basis.

In the absence of statutory procedures, rules respecting the hearing procedures employed by the Board and adopted by it to govern its proceedings are controlling. The evidence presented here is that the Board has always proceeded in a de novo matter. The Court finds no biolation of due process in the matter in which the Personnel Board conducted the proceedings.

Secondly, Appellants contend that the grievance against them was instituted more than ten (10) days after the alleged offenses occurred in violation of *Section 6.2, Grievance Procedure of Article 6* of the Firefighters Union Contract with Anne Arundel County. Under *Section 6.1* of the said Contract a grievance is defined as one to be filed by an individual employee or by the Union. The action taken by the County, the employer, would not be a grievance within the definition of the Contract subject to the agreement. The agreement contemplates grievances by the employee or Union but not by the employer. Part of *Section 6.1* of the Contract states:

> "Grievance involving disciplinary action against employees shall be filed as individual grievances and shall not be filed as Union grievances".

The Court finds no merit to Appellants' contention that they were not accorded due process in this respect.

Thirdly, Appellants contend that the Board arbitrarily denied them due process and equal protection by finding that they had violated certain rules of conduct. The Personnel Board Hearings Rules of Procedure in part provide as follows:

> "2. The proceedings shall be started by the Personnel Board upon a reading of the appeal.

3. The representative of the County shall first present evidence in support of the action taken against the Appellant. The party aggrieved may then put on his case.

4. All witnesses shall testify under oath and be subject to cross-examination. The Personnel Board shall not be bound by technical rules of evidence, but in its discretion may hear testimony to which there has been an objection.

5. After both sides have closed their case, the aggrieved party or his attorney may argue, after which the representative of the County may argue. The aggrieved party or his attorney shall then be given the opportunity for closing argument, after which argument shall be over as to both sides and the case submitted to the Board for deliberation."

These Rules of Procedure quite clearly contemplate the taking of testimony and other evidence, and argument, something more akin to a de novo hearing than a review of a record.

Personnel Rules 9.4.1 provides:

"An appointing authority may dismiss an employee who is unsuited for County employment because he deliberately violates the established policies, procedures, rules or accepted standards of personal conduct. Reasons for dismissal shall include:

9.4.1.2 That the employee has committed an act on or off duty which amounts to conduct unbecoming to his rank or position."

Appellants argue that their conduct was not work related or endangered public safety and that the County introduced no evidence to show what standard should be applied as to the performance of their duties as firemen. One answer to this contention is that Appellants engaged in conduct while on duty and on County property which constituted a felony for which life imprisonment might have been imposed. Under such circumstances the trier of fact would hardly need evidence of a standard of conduct by which to measure the Appellants' conduct as proscribed by the regulation.

Finally, Appellants contend they were denied equal protection and due process because the Board took one vote on the two personnel regulations, one of which warranted dismissal and the other only suspension; and that they were required to refute the charges against them (not presumed innocent); and that the Board acted improperly in discussing the charges with persons not a part of the hearing as reported in the Chairman's deposition taken after the hearing.

Even if the Board took one vote on both regulations and decided on dismissal, then it must be presumed to have found Appellants in violation of the regulation warranting dismissal. The fact is that either or both regulations authorized dismissal.

The Board's comment that Appellants did not deny the charges is not significant; such a comment being no more than to note that Appellants offered no evidence to dispute that with which they were accused of doing. Furthermore, the proceedings were not criminal in nature, but were civil and the Board could certainly note that there was no evidence to the contrary of that produced by the County.

There is no evidence that the Board members were guided in their decision by any discussions had with persons not a part of the proceedings, assuming as contended that some of the Board members did so discuss the matter with others.

The decision of the Board carries with it a presumption of validity and will not be disturbed on appeal if the record shows substantial evidence to sustain its finding and conclusion. *Heaps vs. Cobb*, 185 Md. 372.

This Court finds that the evidence fully supports the Board's findings and conclusions, and absent a showing that the decision was arbitrary, capricious or illegal, has no authority to disturb the Board's decision. *Baltimore Import Car vs. Maryland Port Authorty*, 258 Md. 335.

The fact that two of the firemen were suspended and not dismissed as were Appellants does not render the decision of the Board discriminatory. The evidence shows the two who were suspended did not engage in the misconduct while on duty and on County property, a clear justification for distinction in action taken by the Board.

For the foregoing reasons the decision of the Personnel Board is affirmed.

DATE: April 26, 1978

/s/Nat W. Hopper
JUDGE

This is to certify that a copy of the aforegoing Petition for Writ of Certiorari was sent this 24th day of July, 1978, to Michael Roblyer and Robert C. Wilcox, at the County Solicitor's Office, Arundel Center, Annapolis, Maryland, 21401.

FREDERIC BRANDES